**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 15326 of 2006**
**With**
**SPECIAL CIVIL APPLICATION No. 20455 of 2006**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE JAYANT PATEL**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**GC YADAV D S P (WIRELESS) (RETIRED) - Petitioner(s)**
**Versus**
**ADDL. CHIEF SECRETARY & 3 - Respondent(s)**

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**Appearance :**
MR NIKHIL S KARIEL for Petitioner(s) : 1,
GOVERNMENT PLEADER for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1 - 4.

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**CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL**

**Date : 27/11/2007**

**COMMON ORAL JUDGMENT**

1. Rule in both the petitions. Ms. Sangeeta Vishen

learned AGP waives service of notice of rule for the State authority in Special Civil Application No. 15326 of 2006 and Mr. Dabhi learned AGP waives service of notice of rule for the respondent authority in Special Civil Application No. 20455 of 2006. With the consent of the learned advocates appearing for both the sides, the matters are finally heard today.

2. As the issues arise for consideration in both the petitions are interconnected they are being considered by the common judgement.

3. The short facts of the case appear to be that the petitioner who is Dy. S.P. (wireless) working in the State Government, during the course of his service had preferred Special Civil Application No. 12106 of 1994 and 11254 of 1998 for the purpose of claiming benefits of seniority and promotion in the cadre in which he was working at the relevant point of time. This Court by interim order had directed certain benefits to be conferred upon petitioner of the seniority and the promotion. The said order ultimately came to be operated and as per the

respondent State authority the benefits were given, since this Court had directed. However they are subject to outcome of Special Civil Application No. 12106 of 1994 and 11254 of 1998, the contention of the respondent State authorities is that since both the petitions are pending, it cannot be finally concluded that the petitioner would be entitled to the benefits of seniority and promotion as the case may be in accordance with law. It appears that petitioner was posted as Dy. S.P. on 25.11.1999 and thereafter, he continued on such post and he retired from service on attaining the age of superannuation on 31.05.2005. As per the petitioner he was required to pay all retiral benefits within some reasonable time but no payment was made. There are various correspondence pertaining thereto, but the grievance of the petitioner is that delay in all the retiral benefits has resulted in to great hardships and as a result thereof, he could not vacate the quarter, since he could make arrangement on account of none disbursement of

the retiral benefits to him by the State Government. The petitioner has preferred Special Civil Application No. 15326 of 206 for challenging the order of the authority for withholding of the pension and other retiral benefits. The petitioner has prayed in the said petition for directing respondent authority to ensure that all the legal formalities of the payment of retiral benefits of pension to the petitioner are complied with, and to ensure that the petitioner gets his retiral benefits of the pension and the arrears of the pension forthwith.

4. It appears that as observed earlier, since the petitioner could not vacate quarter within stipulated time limit after the retirement, the respondent authority with the assistance of the Executive Engineer assessed the market rate at Rs. 10,000/- per month, and as recovery was sought to be insisted, the petitioner preferred Special Civil Application No. 20455 of 2006 for challenging the action of the authority for recovering of the amount of market rate, and it

is also prayed that the respondent be restrained from interfering the petitioner from occupying the rent-free accommodation alloted to him till he is paid the pension and other retiral benefits.

5. It deserves to be recorded that in Special Civil Application No. 20455 of 2006, this Court had granted stay against recovery at the initial stage, which has continued till today. However, thereafter, in both the petitions this Court on 30.08.2007 (Coram: H.K. Rathod,J.) passed the following order:

> "1. Heard learned Senior Advocate Mr.B.P.Tanna with Mr.Nikhil S. Kariel, learned advocate, appearing for the petitioner and learned Government Pleader Mr.S.S.Shah with learned Assistant Government Pleaders Ms.Sangeeta Vishen and Ms.Sandhya Natani appearing on behalf of the respondent-State Authorities in both the matters.
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> 2. Considering the submissions made by the learned advocates for the respective parties, now the only question, which is required to be considered by this Court at

this stage, is whether the petitioner is entitled to pension and gratuity amount from the respondents or not and if yes, then how much amount is to be paid by the State Government?

3. Considering the submissions made by the respondent–State Authorities, it is directed to the respondent-State Government to pay pensionary benefits and the amount of gratuity to the petitioner, which are available and legally due to the petitioner, according to the Pension Rules as well as the Service Rules, within a period of one month from the date of receipt of copy of this order. The aforesaid directions issued by this Court are without prejudice to the rights and contentions that may be available to either party and subject to further order to be passed by this Court.

4. Considering the aforesaid directions, the matters are adjourned to 27th September 2007.

5. I*nterim relief* granted by this Court in Special Civil Application No.20455 of 2006 shall remain continue till 27th September 2007.”

6. Thereafter, on 29.09.2007 order has been passed by the competent authority pursuant to the aforesaid order dated 30.08.2007, passed by this Court, which inter alia shows that the full pension of the petitioner is sanctioned based on his last salary drawn on the date of retirement i.e. 31.05.2005, and the gratuity is also sanctioned as per the last pay. However, out of the total amount of gratuity of Rs. 3,35,198/-, the amount of Rs. 2,18,683/- is withheld since the recovery of the market rate for unauthorised occupation of quarter is subject matter of the proceedings in Special Civil Application No. 20455 of 2006. The other aspect of the order dated 29.09.2007 passed pursuant to the order passed by this Court dated 30.08.2007, are not much in dispute. The said order is also placed on record by Mr. Karial learned Counsel appearing for the petitioner, and it is an admitted position that such order has been passed by the authority.

7. I have heard Mr. Karial learned Counsel appearing for the petitioner, Ms. Sangeeta

Vishen as well as Mr. Dabhi learned AGP's appearing in the respective petitions.

8. It appears that on account of the aforesaid development in the present both the petitions, the aspects which deserve to be considered are as under:

    1. The consequence of the pendency of the Special Civil Application No. 12106 of 1994 and Special Civil Application No. 11254 of 1998 in the payment of the retiral dues of the petitioner.
    2. Whether the petitioner would be entitled to commute his pension as if sanctioned on the basis of his last salary drawn.
    3. Withholding of the amount of gratuity and recovery of the penal rate/market rate for unauthorised occupation of the quarter after the prescribed limit.
    4. Appropriate directions.

9. It is true that the petitioner did prefer Special Civil Application Nos. 12106 of 1994 and 11254 of 1998, and it is an admitted position that as per the order dated 25.10.1994 passed by

this Court (Coram: M.R. Calls,J.) in Special Civil Application No. 12106 of 1994 read with the order dated 24.01.1996 passed by this Court (Coram: M.S. Parikh, J.) in Special Civil Application No. 12106 of 1994, this Court by interim order directed the consideration of the candidature of the petitioner as if appointed on the post of Police Wireless Sub-Inspector on 10.01.1977 and the placement of his name in the seniority dated 27.08/09.1994 in terms of the judgement and the decree passed by the Court of Civil Judge (SD), Palanpur dated 26.04.1990. There is no dispute on the aspect of the interim order passed in the aforesaid proceedings operated, and as per the case of the respondent authority, the petitioner came be promoted on the higher post pursuant to the interim order passed by this Court.

10. It is true that interim order passed in any proceedings is subject to the final order, which may be passed by this Court in the said proceedings. However, it appears that during the operation of the interim order, and before issue

arising in the aforesaid petition is finalised by this Court, the petitioner has reached to the age of superannuation and has retired. Therefore, under these circumstances, when the interim order was passed by this Court, and is implemented by the authority, and the employee is reached to the age of superannuation, it would be unreasonable on the part of the said authority to withhold the pensionary benefits, merely because that concerned petition is not finalised. At the most the State authority would be justified in insisting for bond and declaration by the employees concerned, that in the event he loses in the such proceedings, the authority shall be at liberty to recover the difference of the amount of retiral benefits, and may also be at liberty to recover the amount from the remaining amount of the pension in future. However, merely because the delay has caused in final adjudication of the proceedings in the matter like present one, whereby the benefits were conferred pursuant to the interim order passed by this Court, it cannot be

concluded that the disbursement of all the retiral benefits be differed or withhold until final adjudication of such proceedings. It may be observed that it is in view of the present peculiar facts and circumstances of the case that the interim order came to be passed by this Court, was implemented by the authority and before it was finalised the employee reached to the age of superannuation, and has retired, are also considered by this Court, the aforesaid observation deserves to be made.

11. Therefore, in view of the aforesaid, the petitioner can be put to the condition of giving bond for recovering of the amount of refund of the amount, and further declaration before the authority that he would not object, if the amount is recovered from the pension also. But both upon the contingency that he loss in the proceedings of Special Civil Application Nos. 12106 of 1994 and 11254 of 1998.

12. In view of the aforesaid observation made on the first aspect, and as pursuant to the direction issued in the present proceedings,

pension is already sanctioned on the last pay drawn, the petitioner would be entitled to commute pension in accordance with the prevailing policy of the government on the date of retirement but of course the disbursement of such commuted pension shall also be upon furnishing of the bond and the declaration as the case may be for refund and recovery of the amount of difference in the aforesaid proceedings which are pending. However, it cannot be said that when the pension is sanctioned based on the last salary drawn, the petitioner would not be entitled to commute the pension as per the prevailing policy of the government.

13. It is the duty of the employee concerned to vacate the quarter after retirement within stipulated time limit, but at the same time it is also the duty upon person who are enjoined with the power to pay legitimate retiral dues to the employee concerned for making arrangement of his livelihood. In any case if the government employee is entitled to the amount of gratuity

upon his retirement, and such amount is not actually disbursed, the government would be required to pay reasonable bank rate interest by the compensatory measure to such employee. In the same way if the government servant has continued to occupy the quarter unauthorisely, it would be required for him to pay the reasonable market rate to the State government for unauthorised occupation of the quarter. The quantum of market rate may vary from facts to facts depending upon the area occupied by the employee and the market rate prevailing in particular city or the town etc.

14. It appears that in the present case no opportunity of hearing was given to the petitioner before the fixation of the market rate of the quarter for the period, during which the petitioner unauthorisely occupied the quarter. It may also be recorded that the petitioner has now vacated the quarter pending the proceedings, therefore, only aspect which may arise for consideration of the authority is for recovering of the market rate for the period

during which the petitioner unauthorisedly occupied the quarter. As per the respondent authority the Executive Engineer was consulted and the opinion was for Rs. 10,000/- per month being the market rate for unauthorised occupation, whereas the petitioner has not admitted the same. Had the principles of natural justice followed before issuing order of recovery, the petitioner could produce the material to show market rate of the area, which he was occupying would be other than the amount assesses by the Executive Engineer. It may be that adjudicating authority after considering the material from the Executive Engineer, and the material which may be produced by the petitioner, may be arrive at particular amount being market rate to be recovered for unauthorised occupation by the petitioner. But in the present case no such adjudication has also taken place after giving opportunity of hearing to the petitioner. It may be observed that in the matter of recovery of the arrears of market rate, the principle of full fledged

adjudication would not apply, but minimum principle of natural justice of giving opportunity to show-cause, and to produce the material and the application of mind by the authority on the relevant aspects, is required. The aforesaid process in any case has not been undertaken, therefore, the suitable directions deserve to be issued while quashing the order of recovery, which has been passed in breach of principles of natural justice.

15. Further as observed earlier upon the amount of gratuity, which is legitimate payable to the petitioner, such amount is already withheld and actually not paid, and as the government has enjoyed the money, by way of compensatory measures the State would be required to pay the prevailing bank rate interest to the employee concerned on the amount of gratuity, which has been withheld.

16. Considering the fact and circumstances, it appears that interest at the rate of 9 percent can be said as reasonable and proper amount by way of compensatory measures to be awarded to

the petitioner on the amount of gratuity, which has been withheld, of course such amount of interest is to be adjudicated in the recovery to be finalised towards unauthoised occupation of quarter by the petitioner.

17. In view of the aforesaid, I find that the following direction shall meet with the ends of justice.

1. The petitioner shall furnish the bond and declaration in writing within two weeks from today to the concerned authority that he shall refund the amount of difference towards all retiral benefits, and the authority shall also be at liberty to recover such amount from the remaining pension, if petitioner ultimately loses in the proceedings of Special Civil Application Nos. 12106 of 1994 and 11254 of 1998.

2. The order dated 28.09.2007 and the amount of gratuity of Rs. 1,15,515/- shall be actually disbursed to the petitioner on or before 31st December 2007 on compliance to aforesaid condition of furnishing bond and

the declaration.

3. Upon compliance of the earlier direction, the authority shall calculate commutation of the pension of the petitioner from 31.12.2007, as per the prevailing policy of the government on 1.6.2005, and on the basis of monthly pension of Rs. 8537/-. Such commutation shall be calculated, sanctioned and disbursed to the petitioner within a period of four months from the receipt of the bond and the declaration.

4. The order passed by the respondent authority for recovery of the market rate at the rate of Rs. 10,000/- per month for unauthorised occupation of the quarter is quashed and set aside with the direction that the concerned authority shall give opportunity of hearing to the petitioner, and the petitioner shall be at liberty to produce the documents showing prevailing market rate, and the authority shall decide the actual amount of market rate to be recovered for the period during which the petitioner unauthorised

occupied quarter. Such exercise shall be completed within a period of four months from the receipt of the order of this Court.

5. After the amount is finalised of recovering towards market rate as per the earlier direction, the authority shall also calculate the interest at the rate of 9 percent per annum from 1.6.2005, on the total amount of Rs. 3,35,198/- being amount of gratuity minus the interest on the amount of Rs. 1,16,515/-, which may be paid to the petitioner pursuant to the order dated 28.09.2007, passed by the Director General of Police. The aforesaid amount of interest shall be in addition to the amount of Rs. 2,18,683/-, which is withheld. After making the total calculation of both the figures namely amount of interest as it may becomes due and of Rs. 2,18,683, the authority shall be at liberty to retain the amount of market rate as may be fixed pursuant to the earlier direction, and the balance amount of gratuity shall be disbursed to the

petitioner within a period of two months from the date of finalization of the amount of market rate by the concerned authority.

18. Petitions are partly allowed in terms of the aforesaid directions. Rule made absolute accordingly. No order as to cost.

**(JAYANT PATEL,J.)**

Suresh*